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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-13-0009
)
) COMMENT OF ARIZONA
Petition to Amend Rule 32.5, Arizona) ATTORNEYS FOR CRIMINAL
Rules of Criminal Procedure) JUSTICE REGARDING PETITION
) TO AMEND RULE 32.5, ARIZONA
) RULES OF CRIMINAL
) PROCEDURE
)
)

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 AACJ previously submitted a comment supporting the rule change petition filed by the State Bar of Arizona and incorporates by reference all of its reasons stated in the original comment. By order of this Court dated September 4,

2013, a new draft amendment to Rule 32.5 has been proffered and circulated for comment. AACJ asks this Court to adopt the rule change submitted by the State Bar, because the Court's proposal does not remedy the problem.

¶3 There is nothing wrong with requiring *pro se* defendants to certify that their petitions “include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed...” In fact, such a requirement serves a valid purpose: *pro se* defendants in post-conviction proceedings rarely have access to a lawyer, and this certification places defendants on notice that they only get one bite at the apple. The problem with the certification process is the unnecessary encumbrance upon counsel and invasion into the privileged communications between attorney and client. Hence, there is no reason to delete the Rule 32.5 certification as to *pro se* defendants.

¶4 By failing to incorporate the State Bar's “appearing *pro se*” language, the Court's proposal fails to take account of the language of the rule that “[t]he petition shall be accompanied by a declaration by the defendant stating under penalty of perjury that the information contained is true to the best of the defendant's knowledge and belief” does not necessarily apply in cases where the defendant is represented by counsel. When counsel is filing the petition, it is not at all uncommon for the information contained in the petition to have been obtained by counsel without any participation from the defendant. To the extent that the

facts supporting the petition come from the defendant, the rule still requires that “[f]acts within the defendant’s personal knowledge shall be noted separately from other allegations of fact.”

¶5 As stated in AACJ’s prior comment to this rule change petition, Rule 32.5 was crafted in an era when noncapital defendants had no right to counsel at the time the petition for post-conviction relief was being filed and when the preclusive effect of Rule 32.2 was far more limited than it is today. Now, all defendants who file a first timely notice of post-conviction relief (or a second notice in the case of of-right Rule 32’s) are appointed counsel on request. *See Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011) (interpreting Rule 32.4(c)(2)). Attorneys are aware of Rule 32.2 and already raise every known claim that could benefit the client.

¶6 Rule 32.5 contains significant information that applies equally to petitions filed by counsel and *pro se* petitions, and there may be concerns that adding “appearing *pro se*” to the first sentence of the rule might lead practitioners and courts to interpret the entirety of the rule as applying only to *pro se* petitioners. Such an interpretation would relieve counsel of the requirements for compliance with the page limits, supplying affidavits or other evidence to support the petition, and legal and record citations and memoranda of points and authorities. Should this be a concern, AACJ suggests that Rule 32.5 be divided into subsections (a) and (b),

where (a) contains the information applicable to pro se pleadings, and (b) contains the requirements for all Rule 32 petitions. The rule could appear as such:

Rule 32.5. Contents of petition

(a) When the defendant is appearing *pro se*, ~~The~~~~the~~ defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact. The petition shall be accompanied by a declaration by the defendant stating under penalty of perjury that the information contained is true to the best of the defendant's knowledge and belief.

(b) In all cases, ~~Affidavits~~~~affidavits~~, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. A petition which fails to comply with this rule shall be returned to the court to the defendant for revision with an order specifying how the petition fails to comply with the rule. A petition that has been revised to comply with the rule shall be returned by the defendant for refiling within 30 days after defendant's receipt of the non-complying petition. If the petition is not so returned, the court shall dismiss the proceedings with prejudice. The period for response by the state shall begin on the date a returned petition is filed.

These minor modifications would clarify which requirements apply only to pro se defendants and which requirements apply to all cases, including those where counsel represents the defendant.

¶7 Notably, no prosecuting agency or attorney filed a comment supporting or opposing the rule change petition submitted by the State Bar of Arizona. Clearly, this issue is of little consequence to the prosecution. It is of great concern to the criminal defense bar, however, and for the above reasons, AACJ respectfully requests this Court grant the State Bar of Arizona’s petition to amend Rule 32.5 by adding the words “appearing *pro se*” to the beginning of the rule’s text. Alternatively, AACJ asks this Court to adopt the changes suggested in this comment.

DATED: October 25, 2013.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
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